No. 82-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER ON THE MERITS

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TABLE OF CONTENTS

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I

REPLY TO BR. 24-31

The filing of petitioner's brief on the merits has caused the Solicitor General to suddenly abandon a significant concession initially made in the court of appeals and repeated here.

> "[W]e conceded in the court of appeals and in our Brief in Opposition (at 7 n. 5), that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient. Upon further study we have come to question whether this is necesarily so." (Br. 31 n. 25)[1]

We find untenable the government's related claim that it does not fully comprehend the implication of that concession. *E.g.*, at Br. 19 n. 14 the government disputes our assertion that it "concedes that petitioner has raised a valid double jeopardy claim (Br. 6, see *id.* at 16)," as one made "without support." Certainly, at least one in the array of government counsel fully understands that this assertion squarely rests upon the withdrawn concession — a relationship we have specifically traced at Br. 9-10. To repeat, *if as conceded,* the conviction obtained at the second trial must be reversed, that trial is violative of petitioner's right not to be twice placed in jeopardy and should never occur. Since petitioner is not required to run the gauntlet a second time if his insufficiency claim concerning the first trial is correct, he has *a fortiori* raised a *concededly* valid, enforceable double jeopardy claim.[2]

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[1]Additionally — as the tapes will confirm — government counsel made the same concession at oral argument in the court of appeals.

[2]The government's alleged failure to grasp that our assertion was grounded in its withdrawn concession, completely deteriorates when we next consider petitioner's Reply to the Government's Brief in Opposition. In the opening paragraph we find:

> "At note 5 thereof (Br. 7) appears the concession that if petitioner were convicted at a retrial, such conviction must be reversed if 'the evidence at the first trial was legally insufficient . . . .' The government thus *fully supports* our argument that, in the circumstances presented, the second trial would itself be improper because it would violate petitioner's constitutional right not to be twice placed in jeopardy." (Emphasis supplied)

By withdrawing the concession, the government has afforded itself the opportunity to invoke a first-time argument that no double jeopardy violation is occasioned by a hung jury predicated on insufficient evidence (Br. 24-31), and it is, therefore, proper to retry petitioner. With the concession in place, it was impossible to advance that claim.[3]

On the other hand, that concession was heavily relied upon by: (1) the court of appeals' opinion (Pet. App. 5a-6a); (2) petitioner's reply to respondent's opposition to certiorari (Br. 1); (3) petitioner's brief on the merits (Br. 9-12); and (4) by necessary implication, this Court in granting the petition. The clearly manifest purpose of the government's eleventh-hour retrenchment, is nothing less than an unbecoming effort to scuttle a major assumption upon which the brief for petitioner rests. In reliance upon that concession we fairly concluded – as did the court of appeals – that the government agreed with our assertion

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[3]Regardless of the objection lodged against the conclusion that petitioner has drawn from the concession (Br. 19 n. 14), in reality, the concession was only achieved because that precise conclusion must also have been drawn *by the government, i.e.*, "petitioner has raised a valid double jeopardy claim." It is unassailable in logic that the government's new argument (Br. 24-31), and the concession are mutually exclusive. Although the government weakly suggests that they may co-exist (Br. 31 n. 25), its own theory (Br. 24-31), destroys that notion. For, according thereto, appeal from a conviction at the second trial could never implicate double jeopardy concerns about the mistrial, because that first proceeding generated "no judicial determination of insufficiency – and therefore no double jeopardy claim . . . ." (Br. 27). There is no mistaking what the government is seeking to establish here; and that is the proposition that *any* number of mistrials bottomed on insufficient evidence present no enforceable double jeopardy claim and a conviction finally obtained on sufficient evidence must stand, because those mistrials "wipe the slate clean." (Br. 31 n. 25)

that insufficient evidence at the first trial generates a valid double jeopardy claim, and thereby narrowed the issue in this Court to whether appellate review of the claim should occur now or after a retrial (Br. 9-10). By abandoning its concession *in medias res*, the government feels free to rotate 180 degrees and now urge that we have raised no valid double jeopardy claim at all (Br. 24-31). Regardless of the merits of this new found learning, it has been forged by undeniably unfair means.[4]

In any event, withdrawl of the concession, we submit, subtracts nothing from the vitality of our double jeopardy claim. In the first place, this fresh government theory has been rejected by every circuit that has considered it. All agree – in accord with the withdrawn concession – that since *Burks*, a criminal defendant can challenge the sufficiency of the evidence presented at his first trial which ended in a hung jury when appealing his conviction at the second trial (Pet. Br. 9 n. 7). Even the instant case, which respondent seeks to affirm, so held (Pet. App. 5a-6a). According to the government's restrictive reading of *Burks*, petitioner can never raise a valid double jeopardy claim because he has not secured a *judicial determination* that the evidence at his mistrial (hung jury) was insufficient (Br. 24-34). Therefore, even though he has a theoretical right not to be retried, there is no *ruling* for an appellate court to give effect to and his right must, accordingly, forever remain inchoate and unenforceable.

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[4]During the course of several hundred criminal trials and scores of appeals, we have stipulated with, conceded to, and otherwise given our word to opposing counsel many, many times. Once relied upon, it is unthinkable that we would thereafter renege on our word in an effort to enhance our cause. For such conduct, above any other, would assuredly and swiftly destroy our credibility in the legal community in which we toil.

In limine, this theory collides with cases such as *United States* v. *Jorn*, 400 U.S. 470 (1971), which enforce a double jeopardy right based upon mistrials declared even before the government completes presenting its evidence. As in the case at bar, those cases involve no prior *judicial determination* barring retrial — as defined by the government — other than one grounded in double jeopardy *per se*. "[I]t became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has long been established as an integral part of double jeopardy jurisprudence." *Crist* v. *Bretz*, 437 U.S. 28, 34 (1978). Undaunted, the government argues that this may be, but because petitioner's claim is noncollateral under *Abney* it is still not a *colorable* claim (Br. 28). Thus, a patently colorable claim is rendered nugatory, we are told, because it cannot be appealed now; *a fortiori*, since it doesn't exist presently it stands no chance of conception after a second trial. This Catch-22 logic further underscores the mandatory need for the government to have withdrawn its concession in order to illuminate us with its new theory.

Furthermore, had petitioner herein been convicted, the government would agree that his conviction, if based on insufficient evidence, must be reversed on appeal with directions to enter a judgment of acquittal under *Burks*. The enforceability of petitioner's double jeopardy claim perforce depends, according to the government, on the necessity for an erroneous second finding by the jury.[3] Under the inverted logic of respondent's brief, for peti-

[3]Since we must assume that the evidence at petitioner's trial was legally insufficient (Pet. Br. 10 n. 10), the trial court would have erred in submitting the case to the jury, and the jury would have erred in finding guilt on insufficient evidence.

tioner to prevail, it literally takes two wrongs to make him right. At bottom, the relevant inquiry is, why should petitioner suffer the denial of his double jeopardy protections because instead of erring completely, the jury came a step closer to the correct result. It does not appear rational to grant or deny a criminal defendant a right to enforce his double jeopardy claim upon the whim of a particular jury. This is especially true since we permit juries to act freely "without regard to logic." *United States* v. *Robinson*, 475 F.2d 376, 383 (D.C. Cir. 1973); *accord, Dunn* v. *United States*, 284 U.S. 390 (1932). From this angle of vision, the government's theory would appear to put a premium upon the ineffective assistance of counsel, because petitioner would have been better served had he been convicted at trial upon insufficient evidence. In reality, no matter what the jury did, the effect upon petitioner remains constant, *i.e.*, his double jeopardy rights would be violated by a retrial. For some reason, the government believes that the Double Jeopardy Clause is so flimsy a guarantee, that the ability to enforce its proscriptions vacillate with the gossamer considerations it has suggested. In these circumstances it is not unusual that no court of appeals has accepted respondent's theory of double jeopardy, and all hold that insufficient evidence resulting in a hung jury generates a valid double jeopardy claim — the majority of them albeit concluding, as in the instant case, that denial of the claim is not an *interlocutorily* appealable order.

Additionally, assuming we have yet to counter the government's argument, the prosecution herein had an unfettered opportunity to introduce evidence in support of the indictment. As we have assumed (Br. 10 n. 10), and demonstrated (Br. 16-26), that evidence was legally insufficient thus requiring the trial court to enter a judgment of acquittal. Had it properly ruled, petitioner would now be

discharged and not facing the prospect of erroneously "running the gauntlet" a second time. As in *Burks,* an appellate finding that the evidence was insufficient means that the trial court erred in not granting the Rule 29 motion. Thus would be abolished the "purely arbitrary distinction between those in [petitioner's] position and others who would enjoy the benefit of a correct decision by the District Court. [In these circumstances] [t]he Double Jeopary Clause forbids a second trial . . . ." *Burks* at 11 (citation omitted).

* * *

> "[Furthermore] [g]iven the requirements for entry of a judgment of acquittal the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple'." *Burks,* at 17.

When all is said and done, no matter how phrased, the government is seeking to have petitioner run the gauntlet a second time when its first effort was legally unsuccessful — this it cannot do consistent with the Double Jeopardy Clause.[6]

II.

REPLY TO BR. 20-24

In one argument the government urges the Court not to consider the facts of this case at all (Br. 39 n. 32), and in

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[6]At this stage, in considering the government's claim, its prior concession should be construed against its present position. That concession was obviously the well-considered product of government counsel, who shared our view of the Double Jeopardy Clause in two courts over a long period of time. We do not really believe that the government's reversal of position is so much a reflection of its actual thinking, as it is an ill-considered, hasty reaction to petitioner's brief on the merits.

another urges it to reject petitioner's double jeopardy claim, not on a legal basis, but rather on a factual one (Br. 20-24). However, in presenting its *Greene* v. *Massey*, 437 U.S. 19, 26 n. 9 (1978), theory, the government seeks the resolution of a major unsettled issue (Br. 21) upon a scant reference to the evidence rather than offering a detailed analysis thereof; the very undertaking we must now pursue in order to expose the erroneous application of that theory to the facts of this case.

While Agent Lee was testifying on direct examination the prosecutor sought to elicit hearsay statements of Leroy Cooper, damaging to petitioner, which we objected to because the government had not yet "proved any conspiracy . . . ." (Tr. 40). After argument, the trial court sustained the objection and precluded hearsay testimony until and unless the conspiracy was established (Tr. 41-42). Once the remainder of the case was in evidence, the prosecutor again sought to elicit Cooper's statements contending that there was now substantial independent evidence of the conspiracy (Tr. 173). After a lengthy colloquy between counsel fully ventilating that issue (Tr. 173-187), the court ruled in the government's favor (Tr. 187), and Agent Lee was recalled to put the statements in evidence. Thus, at the time the court ruled, it had before it all of the evidence in support of the indictment save for the hearsay statements.[7] We thereafter moved for judgment of acquittal at

[7]Although a stipulation concerning the chemists' testimony, *i.e.*, that heroin was recovered and its strength (Tr. 188-189), still remained to be read to the jury, it was given to the court prior to argument on sufficiency (Tr. 170(A)-171), and relied upon by the prosecutor in urging that a conspiracy had been established by substantial independent evidence (Tr. 183).

the close of the government's case and again before its submission to the jury. J.A. 2a; Tr. 203-204, 276, 285-288.

Although the trial court ruled that the conspiracy charge had been proven prima facie enabling it to be submitted to the jury, it clearly had not been. Our brief exhaustively and conclusively demonstrates insufficient evidence to support that finding (Br. 16-26). The best the government can muster in response — after a sparse reference to the facts — is "that a conspiracy existed and that petitioner was a member of it." (Br. 39 n. 32) In making this footnote claim, the government cites no cases, does not analyze the thrust of the evidence, and does not really join issue with us in any meaningful way. Nonetheless, this meager counteroffer is as it should be, for we have always believed in good faith that the evidence was legally insufficient and that no competent lawyer could seriously contend otherwise.

From this vantage point our response to the government's *Greene* v. *Massey* theory is straightforward, *i.e.*, a finding of insufficiency as alleged by petitioner (Pet. Br. 16-26), is tantamount to a judgment of acquittal, has nothing whatever to do with trial error and accordingly, does not implicate the government's theory at all. Central to our reply is the assumption that the standard of review for determining whether or not a conspiracy has been established to allow for the introduction of hearsay statements, is at least as demanding as the one for testing sufficiency at the close of the government's case in a conspiracy trial in which there are no statements. Should the conspiracy fail in either case upon appellate inquiry, a resulting judgment of acquittal must obtain. The reason is clear. In the case with a statement, the trial court determines its admissibility only after the government, as here,

has presented all of its non-hearsay evidence in support of the conspiracy.[8] Therefore, a ruling on the sufficiency of the evidence to support the conspiracy does not rely at all upon the co-conspirator's statement and accordingly, that statement never enters the fact finding process to "contaminate" it under the government's *Greene* v. *Massey* theory.[9] Should the district court err on sufficency and ad-

[8] If the statement is admitted "subject to connection," that same inquiry is still made at the close of the government's case. Furthermore, in a conspiracy case, the government is likely to present all of its available evidence rather than face the prospect of a judgment of acquittal. As respondent concedes:

> "It would be absurd for the government to hold back a part of its evidence – risking acquittal and increasing the cost and uncertainty of litigation – in a misguided attempt to get a "second bite at the apple'." (Br. 38)

[9] At the close of the government's independent case – the statements not yet having been introduced – defense counsel in arguing for their exclusion, in effect, moves for a judgment of acquittal by claiming that a prima facie case of conspiracy has not been established. In the case at bar, for example, we addressed the court in those very terms using the *Glasser* standard of review (Tr. 175-176), and the court concurred in our framing of the inquiry in that manner. Indeed, had the court agreed with our analysis, it would unquestionably have directed a verdict of acquittal on the conspiracy right then. In the usual case, once the statements are admitted and the government rests, the process is repeated, but this time *pro forma* because the court has moments before heard and considered the very argument to be offered. All understand, however, that in renewing the motion for judgment of acquittal, defense counsel is making the precise claim as before *to preserve the record.* In legal contemplation, the court repeats its ruling and denies the motion without ever relying on the statements. It is for these reasons that the initial argument herein on statement admissibility extended over 14 pages of transcript (Tr. 173-187) and our renewed motion after the statements came into evidence consisted of:

> "Mr. Palmer: I would at this point *reiterate* the motion for judgment of acquittal. *Based on the denial* of that motion, we would move to sever count 2 from the indictment." (Tr. 203) (Emphasis supplied)

The fact that the court never considers the statements of co-conspi-

mit the statement, an appellate court would merely track the process and solely look to the independent evidence to determine whether or not a conspiracy had been established, at least sufficiently to take the question to the jury. This is precisely what appellate courts do on direct review all the time. In *United States* v. *Spanos*, 462 F.2d 1012 (9th Cir. 1972) for example, the trial judge found sufficient evidence of a conspiracy and admitted hearsay statements over objection. On appeal, the court found insufficient evidence of the alleged conspiracy, ignored the statements which adequately provided evidence of appellant's participation in a conspiracy, and reversed the case with directions to dismiss the indictment. Accord, *United States* v. *Bentvena*, 319 F.2d 916, 948-949 (2d Cir. 1963).[10]

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rators in ruling on sufficiency is even more clearly demonstrated, perhaps, when we consider a case where the statements have been admitted "subject to connection."

In that case, at the conclusion of the government's case-in-chief, a motion for judgment of acquittal simultaneously addresses the sufficiency of the evidence to go to the jury and the sufficiency of the independent evidence to admit the statements. This is true because both inquiries require a consideration of exactly the same evidence and, the standard of review for the sufficiency question is no more demanding than the one for determining statement admissibility.

Thus, while these statements of co-conspirators may be in evidence, they are always subject to the condition precedent that there exists prima facie proof of the conspiracy *aliunde*.

[10]Although the court did not specifically state that the indictment should be dismissed on the conspiracy count, it is clear from the ruling that that was intended. Although two substantive counts were also reversed, they were the only ones "remanded for a new trial." 319 F.2d at 955.

To our knowledge, no case has ever held or suggested that the government's *Greene* v. *Massey* theory applies in the present context. In fact, of the cases cited to support its claim (Br. 20-21), only one is a conspiracy case and it points exactly the other way. *United States* v. *Sarmiento-Perez*, 667 F.2d 1239 (5th Cir. 1982) (at 1239, middle paragraph).

STANDARD OF REVIEW

In determining the sufficiency of the evidence, the standard of review is whether the facts viewing them in the light most favorable to the government, affording it the benefit of all inferences that logically flow therefrom without regard to the credibility of witnesses, "present substantial evidence of guilt beyond a reasonable doubt." *United States* v. *Chesher*, 678 F.2d 1353, 1358 (9th Cir. 1982). This formulation recapitulates the well-known federal standard. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Jackson* v. *Virginia*, 443 U.S. 307, 317-318 (1979).

Prior to the adoption of the Federal Rules of Evidence, which became effective July 1, 1975, the same standard was applicable for reviewing whether or not a conspiracy was sufficiently established to permit the introduction of co-conspirators hearsay statements.

> "As a preliminary matter, there must be substantial, independent evidence of the conspiracy, *at least* enough to take the question to the jury . . . . Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge." *United States* v. *Nixon*, 418 U.S. 683, 701 n. 14 (1974) (Emphasis supplied).

This is, of course, the *Glasser* or prima facie[11] test. *Accord, United States* v. *James*, 590 F.2d 575 (5th Cir. 1979). If statements were admitted, the jury was then instructed that it could consider the hearsay against a particular defendant only if it first found, beyond a reasonable

[11]The term "prima facie case," which sometimes appears in appellate opinions, is also the trial lawyer's usual jargon which assumes the *Glasser* requisites for review in arguing a motion for judgment of acquittal.

doubt, that a conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. With the adoption of the Federal Rules of Evidence, courts of appeals have reconsidered the matter with a vengeance. Before we turn to the resulting thicket of conflicting opinions, it would be beneficial to first analyze the *Glasser* standard as it applies to a conspiracy indictment.

A conspiracy charge is not a spontaneous event. Normally, such allegation is investigated by trained federal agents whose findings are, in turn, reviewed by knowledgeable Assistant United States Attorneys. The process is further refined by presentation of the case to a grand jury and an indictment returned, whose allegations have by now been very thoroughly screened for evidentiary support. When this conspiracy count is again tested for sufficiency at the close of the government's case – assuming for present purposes that no statements are offered requiring a prior determination – the result is usually no contest. For while the standard of review sounds onerous, this is more apparent than real. It is at this stage in the proceeding that trial lawyers fully experience the import of viewing the evidence in the light most favorable to the government, without regard to the credibility of witnesses. Thus, – to cite an extreme example – if a thrice convicted perjurer testifies for the government and his testimony flushes out a conspiracy, all of the cross-examination in the world showing this perfidy, and more, is to no avail when moving for a judgment of acquittal. Nor, at the close of the entire case, would it matter that the defendant presented irreconcilable, countervailing testimony from disinterested clergymen. Although in this absurdly weak case the jury would, no doubt acquit, the point of it

is that the government would still get the case to the jury; *i.e.*, it would have presented a prima face case. It is apparent that this "view" of the evidence to test sufficiency, is a potent government ally in meeting that challenge. It is also clear that this standard of review represents the bottom line below which courts may not dip. *Jackson* v. *Virginia, supra.*

Since the new rules of evidence, all of the circuits have held that it is now up to the trial judge alone to determine the *admissibility* of this statement evidence and that the jury is to play no role in *that* determination. The confusion sets in when the courts attempt to effectuate that goal. See Fed. R. Evid. 104, 801 (d)(2)(E). The basic problem they are contending with is this. Prior to the new rules, trial judges were not fact finders, they merely made preliminary determinations whether or not a prima facie conspiracy charge had been established under the *Glasser* test. Now, we are told, they must determine whether or not a conspiracy, in fact, has been established. Normally, that type of determination is made at a separate hearing where competing evidence is introduced and the court resolves issues of credibility in reaching its result. *E.g.*, motions hearings to suppress evidence or exclude confessions. This undertaking in a conspiracy case would involve a mini-trial traversing all of the prosecution and defense evidence and is, accordingly, a burdensome, unworkable procedure. The following are some of the alternative solutions reached:

In *United States* v. *James,* 590 F.2d 575 (5th Cir. 1979), the court held that since statement admissibility, *vel non,* occurs prior to the defense case, the statement can come into the government's case-in-chief – preferably after all of the independent evidence of a conspiracy is introduced

– upon the *Nixon* standard. At the conclusion of all of the evidence the court must determine, *as a factual matter,* whether the conspiracy has been established by a preponderance of the evidence, independent of the statement itself. By using the *Nixon* test, *in limine,* the court believed that serious bootstrapping problems would be avoided. For, if statements of co-conspirators were permitted into evidence on lesser thresholds, and prosecutors could then rely upon them at the close of the case to argue a sufficiency not otherwise achieved, the result would condone the very bootstrapping of a statement to the "level of competent evidence" that this Court long ago condemned. *Glasser, supra,* 74-75; Pet. Br. 17. Thus, in a very real sense, if this were permissible the co-conspirator's out of court statement would then become the independent evidence of the very conspiracy on which its admissibility depended. It is our view, that if after a thorough investigation and the honing of its evidence, the government cannot even achieve the minimal requirements of a prima facie case to "at least" get it to a jury, it is fundamentally unfair to permit the government to reach this otherwise unattainable plateau by reaping the benefit of a hearsay statement. Once the alleged conspiracy fails, it should fail for all purposes. The *James* case, we submit, presents a rather reasonable compromise of the various competing interests. But see *infra,* p. 17 n. 13.

In *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978), the court held that because the trial judge is now the fact finder, "*a higher standard*" of admissibility is required than a prima facie test and adopted a preponderance of the evidence test. *Accord, United States* v. *Trotter,* 529 F.2d 806, 812 (3rd Cir. 1976) ("Since the 'fair preponderance' standard is more severe than the prima facie standard, admission of hearsay under the former would *a for-*

tiori satisfy the latter.")[12] *Santiago,* falters, however, because it does not advise trial courts how to apply this standard prior to the defense case. The admissibility of these statements, obviously, cannot wait until the defense presentation, because a defendant is entitled to move for a judgment of acquittal at the close of the government's case-in-chief Fed. R. Crim. P. 29(a). *Santiago* also reviews the various circuit holdings, concluding that most of them have adopted the fair preponderance test, while two still maintain the prima facie *Nixon* standard.

To this cauldron we add the D.C. Circuit. In *United States* v. *Jackson,* 627 F.2d 1198, 1219-1220 (D.C. Cir. 1980), the court adopted a substantial, independent evidence of a conspiracy test. It then isolated itself from the other courts of appeals, by concluding that this quantum of evidence is less than that required to take the conspiracy question to the jury. Its rationale for doing so is as follows:

> "As the first determination demands only that existence of the conspiracy be proved by substantial independent evidence, proof would seem to be easier than that required to persuade the judge that a reasonable juror could be convinced of guilt beyond a reasonable doubt." 627 F.2d at 1220.

Why this is so we are not told. Nor are we or trial judges advised of the difference between substantial independent evidence and substantial independent evidence *at least* enough to take the question to the jury. Furthermore, as

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[12]The reason the fair preponderance of the evidence test is more severe, is because it assumes that the government has first established a prima facie case under *Glasser*. A trial judge cannot balance competing evidence as a fact finder, if the scale on the government's side is empty.

best we can decipher this opinion, it appears not to require the judge to make a factual finding concerning the evidence, but rather, merely a finding that substantial, independent evidence exists. This case, in addition to allowing the bootstrapping of statement evidence to prove sufficiency, provides for a lesser threshold of admissibility after adoption of the new rules than *Nixon* required before them. Thus, on less evidence than the constitution requires to prove the elements of an offense sufficient to submit to a jury, the court permits introduction of these statements for unfettered use by both the court and jury. This ruling effectively obliterates *any* measure of protection to criminal defendants in admitting these statements. It should be borne in mind that these hearsay utterances are eagerly pressed upon the court by prosecutors, because they are extremely damaging to one or more defendants on trial. Once admitted for the truth, defense counsel cannot cross-examine the absent declarant and is usually found confronting a federal agent through whom the statements are offered. Statements, incidentally enhanced by the agent's own inherent credibility when he repeats them on the witness stand. This holding, obviously, cannot be correct, and we consider it an aberration in the circuits.

In any event, whatever true test may emerge, it is clear that it will, at least, be equal to the *Glasser* standard of review.[13] Accordingly, while the government urges that

[13]The Court should resolve this issue now, in considering the government's *Greene* v. *Massey* claim. Should that occur, we suggest that no present test suffices. The reason is that none of the alternatives surmounts the absence of a hearing or mini-trial, at which the factual issues would be fully ventilated prior to admitting these statements. Even the *James* case does not solve the problem realistically. That case reinstitutes the prima facie test of admissibility at the same time it excises the jury instruction which, at least, afforded defendants some measure of protection against the indiscriminate use of these

this case "provides an opportunity to resolve the issue left open in *Greene* v. *Massey*" (Br. 21), as we have demonstrated, that issue has never surfaced here.

Alternatively, if we are in error, the government's theory fails for another reason. As demonstrated in petitioner's brief (Br. 25), should both sales be attributed to petitioner, a conspiracy would still not be proved under any standard of review. This is true because the one and only damaging effect of all of the hearsay statements is to link him to the first sale.[14]

III

REPLY TO BR. 35

Most of the *in terrorem* arguments advanced in this section of respondent's brief (Br. 34-39) were already considered by petitioner (Pet. Br. 16 n. 18). One observation, however, deserves comment. Respondent fears interlocutory appeal and attendant delay in "almost every prosecution in which there is a mistrial after the close of the government's case." (Br. 35) At worst, this does not

statements. That approach is justified by the requirement that the court thereafter make a factual determination at the close of all of the evidence, as to whether or not a conspiracy has been established by a preponderance of the evidence. To us, it is pure fiction to believe that a trial judge will ever strike these statements and thereby provoke a mistrial, in a case consuming up to three months or more to try, having once allowed them into evidence under the *Glasser* test. Since the mini-trial approach is not feasible, the best solution is probably the one suggested by some commentators who believe that new Rule 104 changes nothing and that the *Nixon* test should still prevail.

[14]Although respondent states that we do not contend that the evidence is insufficient if the allged co-conspirator's statements are considered (Br. 39 n. 32), this is error, and we do so contend. We never have had reason to so state before, because this is the first time respondent has urged its *Greene v. Massey* theory.

amount to much. We stated in our petition that the Administrative Office reported that,

> "for the twelve months ending December 31, 1982, the total number of cases retried after a mistrial in the entire federal system was 58.[9] This figure includes hung juries and mistrials for every other reason for which mistrials are declared, since no separate statistics are kept for hung juries."

[9]"Federal Judicial Workload Statistics, Ad. Off. U.S. Courts, Table D-2, P. A-36" (Pet. 8)

Respondent never mentions these data in any of its pleadings nor, of course, seeks to show to the contrary. Of those 58 cases, very few could be the basis of a good faith interlocutory double jeopardy appeal because valid insufficiency claims are so rare.[13] *Accord, Jackson* v. *Virginia,*

[13]The government speculates that since a motion for judgment of acquittal is routine in criminal cases, *every* mistrial – regardless of cause – declared after the close of the government's case portends a frivolous interlocutory appeal to delay the proceedings. Since it is impossible to predict which cases will terminate in mistrials, the government has this time impugned the integrity of every lawyer for every defendant in every federal district court.

Equally unfounded is the insinuation that the instant appeal is of that dilatory genre (Br. 35 n. 27 and text). Although the mistrial herein was declared on June 26, 1981 – erroneously reported as June 6 by respondent (*id.*) – and retrial then scheduled for September 14, 1981, the district court did not rule on our oustanding motions for judgment of acquittal and to bar retrial on double jeopardy grounds until September 11, 1981 (J.A. 3a-4a, 20a). On that very day we filed a notice of appeal (J.A. 4a), and because we expected the district court to rule against us, we had prepared our appellate brief prior to that denial (J.A. 20-21). The brief was refined and filed in the court of appeals on September 24, 1981. It is ironic, that although petitioner had moved with such celerity to avoid any suggestion that the appeal was taken for purposes of delay, we are now confronted with that very accusation. Subsequent events reveal, however, that it was the government who tarried.

443 U.S. 307, 329 (1979) (Justice Stevens concurring). The bottom line is, should petitioner prevail, that result would generate but a trickle of appellate cases.

Respectfully submitted,

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After numerous delaying motions (J.A. 5a-7a), the government filed its brief on April 8, 1982 (J.A. 7a), almost seven months after petitioner. The latter filed his reply on April 14, 1982 (J.A. 7a). When oral argument was scheduled for June 4, 1982 the government moved to reschedule it so that counsel who was to argue the case could go on vacation (J.A. 7a). When it was finally argued on October 4, 1982 (J.A. 8), another, not so well rested lawyer argued the cause for the government. The balance of the time has been consumed by the normal appellate processes leading to the instant review.

Should petitioner prevail herein, succeeding cases will routinely be decided and frivolous appeals "weeded out." *Abney* v. *United States*, 431 U.S. at 662 n. 8. The latter prospect, according to the government (Br. 36), is so complicated in this type of case that it is not really a feasible alternative. In our judgment, however, given the opposing briefs of counsel, it can rapidly be determined whether or not a sufficiency of the evidence claim presents a truly justiciable issue requiring full review.

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